ROSLI DARUS

v.

MANSOR HJ SAAD & ANOR

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[SUIT NO: 22-129-97]
17 JULY 2001

CONTRACT: *Transfer of land - Whether null and void - Presumption of mala fide and undue influence - Whether rebutted - Onus on dominant party - Contracts Act 1950, s. 16(2)*

EVIDENCE: *Burden of proof - Proof of good faith in transaction - Onus - Upon whom - Evidence Act 1950, s. 111*

The plaintiff pleaded for consequential orders and a declaration that the transfer of his land to the defendants was null and void. The plaintiff alleged that there was want of consideration and contended that the defendants had capitalised on his precarious mental state proceeding his mother's demise and had taken undue advantage of his young years, naivete, immaturity and ignorance to influence and coerce him into executing the said transfer without the privilege of representation or guidance by legal counsel and without being appraised of the purport and effect of his act. He further alleged that having successfully usurped his land the defendants then plotted to have him evicted from the said land.

The defendants refuted all of the above allegations and submitted that the plaintiff's notice demanding re-transfer of the land was defective and invalid. They further contended that the plaintiff had not proved fraud and that there was no subsisting special relationship of confidence between the plaintiff and the 1st defendant to advocate a presumption that such a relationship was abused.

Held:

[1] The equitable doctrine of undue influence held that when there subsisted a relationship of trust and confidence between the parties and by virtue thereof one of them was in a position to exert undue influence or dominion over the other and derived benefit from him, the onus was upon the dominant party to prove good faith of the impugned transaction.

[2] The 1st defendant's eloquent account of the relationship that subsisted between him and the plaintiff provided more than an inkling of the domineering influence he apparently had over the plaintiff and his free will. The 1st defendant had by conduct put himself in *loco parentis* and derived a benefit from the plaintiff. For all intents and purposes the 1st defendant had failed miserably to allude evidence tending towards *bona fide* and free will and rebut the presumption that the transfer was procured by the exertion of undue influence and not given with due freedom and deliberation.

[3] It was not denied that the transfer was wholly disadvantageous to the plaintiff. The 1st defendant feigned ignorance for the plaintiff's reason for such transfer. At the material time of the transfer, the said land was the registered property of the plaintiff. The plaintiff had laboured under the misconception that the defendants were the rightful beneficiaries of the said land and the defendants had by their silence actively concealed the truth from him and perpetrated the misconception. That was *mala fide* and pointed irrevocably towards the fact that the transfer was neither fair nor reasonable.

[4] The defendants had submitted that the transfer was arranged wholly by the plaintiff and they had no active part in it. The plaintiff's unchallenged testimony that the Land Office Administrator had enquired whether he had any objections to the transfer proved otherwise. There was no logical reason for such a query if it had been the plaintiff who had instructed and orchestrated the transfer. The 1st defendant's testimony was sated with inconsistencies and contradictions. That did not augur well for the defendants.

[5] It was trite law that every litigant in a suit had a right, unless he had waived it, to have an opportunity to cross-examine witnesses whose testimony was to be utilised against him. In the instant case, by evading cross-examination the 1st defendant had deprived the plaintiff of that fundamental right. It followed therefore that by law, the 1st defendant's testimony affecting the plaintiff, however probative, had to be disregarded.

[Judgment for plaintiff with costs.]

Case(s) referred to:
Allcard v. Skinner 36 Ch D 145 ***(refd)***
Ballo v. Parasam, A [1972] HP 33 ***(refd)***
Bank of Credit and Commerce International SA v. Aboody [1990] QB 923 ***(foll)***
Barclays Bank plc v. O'Brien [1994] 1 AC 180 ***(foll)***
Benoy v. Santi 40 CWN 45 ***(refd)***
Dick v. Piller [1943] 1 All ER 627 ***(refd)***

Go Pak Hoong Tractor and Building Construction v. Syarikat Pasir Perdana [1982] 1 MLJ 77 ***(refd)***
Huguenin v. Baseley 14 Ves 273 ***(refd)***
Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 ***(refd)***
Maxwell v. Keun & Ors [1928] 1 KB 645 ***(refd)***
Harold Shaw v. Wong Phila Mae [1990] 1 MLJ 205 ***(refd)***
Inche Noriah v. Shaik Allie Omar [1929] AC 127 ***(refd)***
Lim Kim Hua v. Ho Chui Lan & Anor [1996] 2 CLJ 299 ***(refd)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [1995] 2 CLJ 912 ***(refd)***
National Westminster Bank plc v. Morgan [1985] 1 All ER 821 ***(refd)***
Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 ***(refd)***
Smith v. Kay 7 HLC 750 ***(refd)***
Southern Bank Bhd v. Abdul Raof Rakinan & Anor [2001] 1 CLJ 94 ***(refd)***
Tate v. Williamson [1866] 2 Ch App 55 ***(refd)***
Tengku Abdullah Ibni Sultan Abu Bakar v. Mohd Latiff Shah Mohd [1997] 2 CLJ 607 ***(refd)***
V RM M Meyappa Chettiar v. Yin Kok Wee [1952] 18 MLJ 178 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 16(2)(a), (b), 20
Evidence Act 1950, ss. 111, 138

Other source(s) referred to:
Halsbury's, 3rd edn, vol 15, para 800
Halsbury's Laws of Malaysia, vol 1, para 10.8-027
Pollock on Contract, p 581
Pollock's Indian Contract Act, 7th edn, p 92
Sarkar on Evidence, 14th edn, pp 1463-1464, 1467-1468
Sarkar on Evidence, 15th edn, pp 2169-2170

For the plaintiff - Zakaria Md Saad; M/s Zakaria & Co
For the defendants - N Nakaretnam; M/s S Hameed, Venu & Co

Reported by K Ganesh

JUDGMENT

Jeffrey Tan J:
This is an action for a declaration that the transfer by the plaintiff to the defendants of his 1/3 undivided share of land held under Pegangan No. 338 Mukim 9, Daerah Seberang Perai Utara, Pulau Pinang (hereinafter referred to as the said land), *vide* Perserahan 3794/87 Jilid 522 Folio 113 and registered on 14 May 1987, is null and void, and for consequential orders.

The agreed facts are that at the material time the plaintiff was the registered proprietor of the said land, and that *vide* Perserahan 3794/87 Jilid 522 Folio 113 and registered on 14 May 1987 the plaintiff transferred that said land to the defendants in equal shares (see statement of agreed facts marked "A").

Briefly stated, the plaintiff's pleaded case is that the aforesaid transfer was without any consideration and was induced by the undue influence of the defendants. The plaintiff pleaded that the defendants (his uncles) induced him, after the death of his mother who was the defendants' elder sister, to believe (i) that the defendants would hold the said land as trustee/s for him, and, (ii) that the transfer to the defendants would be in his interest although the defendants knew it was not so. The plaintiff further pleaded that the defendants with the knowledge that he was in a state of mental anguish by reason of the death of his mother, induced him to transfer the said land without any consideration to the defendants, that the defendants took advantage of his youth and ignorance to execute, without legal counsel and without being told by the defendants of the purport and effect of his act, in the presence of the Land Administrator, a transfer of the said land, and, that the defendants with the knowledge that he was naive, immature in thinking and character and was without other family members, and with the intention to usurp the said land, induced him to execute the said transfer. The plaintiff lastly pleaded that after the transfer of the said land the defendants threatened to evict him from the said land, that when he sought out legal counsel, he got to know of the said transfer, and, that the defendants, despite his oral demands, had refused to re-transfer the said land to him.

The defendants pleaded as follows. The plaintiff was the adopted child of their elder sister. They are the plaintiff's uncles. They, their elder sister and husband lived in one house. Their elder sister and husband adopted the plaintiff when he was two days old. Since then, they accepted the plaintiff as a member of the family. The 1st defendant and his wife organised the marriage of the plaintiff. The plaintiff wanted to transfer the said land to the defendants. The plaintiff did not raise any complaint or objection when he executed and after he executed the transfer. The plaintiff only filed his action after ten years. The plaintiff intended to transfer the said land. There was sufficient consideration for the transfer. The transfer is valid. The defendants had not cheated nor and had induced the plaintiff to transfer the said land in the circumstances alleged. The plaintiff was 24 years old when he executed the transfer, and therefore knew the purport and effect of his act. The defendants had not threatened to evict the plaintiff from the said land. The plaintiff is still on the said land. The plaintiff knew that the 1st defendant paid the quit rent in respect of the said land. The plaintiff's notice demanding a re-transfer of the said land was defective and invalid. The plaintiff had not orally demanded for a re-transfer of the said land.

The plaintiff, who called no other witness, testified as follows. He is staying in a house (2125 Mukim 9 Permatang Tok Jaya) erected on the said land. He has been staying there with his mother (Che Siah binti Abu Bakar) since his birth, on 2 January 1964. His father died in 1975. There are no other relatives

staying in that house. His mother supported him until she died on 23 January 1986. After her death, the 1st defendant supported him; the 1st defendant gave him food for about three - four years. The defendants are his uncles. He is now staying alone in 2125 Mukim 9 Permatang Tok Jaya. In 1987, he obtained employment in a factory. In 1990, he got married. Since his marriage, he no longer had his meals with the 1st defendant. Page 1 of the Agreed Bundle (AB1) was the memorandum of transfer of his 1/3 undivided share to the defendants. At about 8am to 8.30am on 24 March 1987, the 1st defendant came to his house and told him that the 2nd defendant wanted to speak to him over the telephone at the 1st defendant's house. He followed the 1st defendant to the 1st defendant's house. There he waited for the 2nd defendant's telephone call. At about 9am, the 2nd defendant telephoned and instructed him to go to the Land Office and do what the Land Office would ask of him. After that telephone call, he and the 1st defendant went to the Land Office. At the Land Office, employees of the Land Office asked him whether he would agree to give the said land to the defendants. He did not know why he was so asked. He had no idea what was going on. He asked for 15 minutes to give his answer. He said to the 1st defendant that he (plaintiff) wanted to speak to him (1st defendant) outside the Land Office. The 1st defendant told him that he (plaintiff) could not take the said land as it was the property of the estate of Tok Wan Abu Bakar – his mother's father. He (plaintiff) did not answer the 1st defendant. He took the 1st defendant inside the Land Office and gave his consent to an officer of the Land Office for the transfer. The 1st defendant was present but the 2nd defendant was not. He felt slighted that he could not inherit the property of Tok Wan. The 1st defendant did not make any promise when he executed the transfer. The 1st defendant did not say that he (1st defendant) would support him. The 1st defendant did not say that he would hold the said land upon trust for him. If anyone else had asked him to execute the transfer, he would not have done so. When his mother was not well, she entrusted her jewellery to him. In 1997, the 1st defendant intimated that he (1st defendant) did not like him (plaintiff) occupying the said land. He is now residing with his wife at Kepala Batas. He intends to reoccupy the said land.

Under cross-examination, the plaintiff testified that he had no intention of transferring the said land, but he executed the transfer as the defendants had asked him to do so. He did not say to the Land Administrator that he had no intention of transferring the said land to the defendants. He did not inform the Land Administrator that he was forced to execute the transfer. The 1st defendant bore the expenses of his marriage. (The plaintiff was not re-examined.)

The 1st defendant, a retired factory worker and the only witness for the defendants, testified that the plaintiff is the adopted son of his elder sister. After the death of his sister, he took possession of the land title and learned that his sister had transferred the said land to the plaintiff. The plaintiff got to know of the transfer from his sister. He did not ask the plaintiff to transfer the said land to the defendants. When he (plaintiff) got to know of the transfer to himself ("bila plaintif dapat tahu pindah milik kepada dia, plaintif sendiri dengan rela, serah tanah kepada defendan kedua dan saya"), the plaintiff voluntarily surrendered the said land to the defendants. The plaintiff felt morally obligated (mengenang jasa) as he (1st defendant) had raised him (plaintiff) from young and the plaintiff knew that he is an adopted child, whereas the said land was the property of his (1st defendant) father. Prior to the transfer – Perserahan 3794/87 Jilid 522 Folio 113 and registered on 14 May 1987 – the whole of the entire land was registered in the names of the plaintiff and defendants in equal shares. At the material time of the transfer, the undivided share of the plaintiff was no longer the property of the estate of Tok Wan. He did not know why the undivided share of the plaintiff was transferred to the defendants. It was transferred as the plaintiff had other lands in Kuala Muda. He shouldered the expenses of the plaintiff and his mother as the plaintiff's mother was not gainfully employed. He looked after the plaintiff for 18 years. After the plaintiff's father passed away, he supported the plaintiff and his mother until the plaintiff was an adult. He did not force the plaintiff to transfer the said land. The plaintiff asked him to go to the Land Office. The plaintiff gave instructions for the preparation of the memorandum of transfer. The 2nd defendant was present at the time of the execution of the transfer. The plaintiff did not object to the transfer – "Rosli tidak membantah tentang pindahmilik". He paid the quit rents in respect of the said land and the stamp duty in respect of the transfer. The plaintiff had no money to pay the quit rent. The plaintiff had not paid any quit rents from the time of the transfer of the said land.

Under cross-examination, the 1st defendant testified that he did not know if a 'petition writer' had prepared the memorandum of transfer (AB1-AB4). He could not remember at what point in time the plaintiff proposed to transfer the said land, or what the plaintiff said with regard to the transfer. After the death of the plaintiff's father, he (1st defendant) provided the plaintiff with food, clothing and expenses. After the death of the plaintiff's mother and until 1990, he (1st defendant) continued his role as the plaintiff's guardian. In 1990, the plaintiff got married. In 1986, the plaintiff was not working. The plaintiff only commenced work when he was 25 years old. The plaintiff had his meals in his house. The 2nd defendant had not looked after the plaintiff. If the plaintiff misbehaved, he would reprimand him, just as a father. But he had

never hit the plaintiff. He played the role as father to the plaintiff. The plaintiff always obeyed his instructions. Since the death of his parents, the plaintiff listened to his advice and instructions. But he did not instruct the plaintiff to transfer the said land. He did not say that the said land was the property of the estate of Tok Wan and or that the plaintiff must therefore execute a transfer. The 1st defendant did not agree with the suggestion that the plaintiff on 24 March 1987 was not mentally stable and so could not have proposed the said transfer. Further cross-examination of the 1st defendant was adjourned at that point to the next hearing day.

But both defendants were not present in court on the next hearing day. Hearing was stood down to enable Mr N. Nakaretnam for the defendants to contact his clients. When the case was recalled about half an hour later, Mr Retnam informed the court that he had spoken to his clients who had instructed him to apply for an adjournment of the hearing, but that his clients had not given any reasons for their application. Then without stating so much as a ground, Mr Retnam promptly applied for the hearing to be adjourned. Mr Zakaria Md. Saad for the plaintiff objected and said that he was ready with his legal submissions.

On the matter of an adjournment of a hearing or trial, a court has the inherent powers to adjourn a hearing in order to do justice between the parties. "The grant or refusal of an adjournment is a matter within the pure discretion of a judge having control of the proceedings ..." (*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [1995] 2 CLJ 912, per Gopal Sri Ram JCA). "... it is a matter of discretion for a judge to exercise according to the facts and circumstances of each case" (*Harold Shaw v. Wong Phila Mae* [1990] 1 MLJ 205, per Yong Pung How J, as he then was; see also *Go Pak Hoong Tractor and Building Construction v. Syarikat Pasir Perdana* [1982] 1 MLJ 77). Nonetheless, "in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to that other party by coming to that conclusion" (*Maxwell v. Keun & Ors* [1928] 1 KB 645, per Lord Atkin LJ). "The question to ask in any particular case is whether on the facts there are sufficient reasons to refuse the adjournment" (*Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26, per Hashim Yeop A. Sani FJ, as he then was; see also *Dick v. Piller* [1943] 1 AER 627). But in the instant case, there were no reasons to grant the adjournment – no grounds were put forth for the adjournment. Without grounds, let alone proper grounds, and facts for the court to exercise discretion, the adjournment was refused (see *V. RM.M. Meyappa Chettiar v. Yin Kok Wee* [1952] 18 MLJ 178); both parties were ordered to proceed with the hearing. Then giving the reason "kerana defendan tidak hadir

dan oleh saya diarah meneruskan kes, terpaksalah saya menutup kes defendan", Mr Retnam who had "complete authority over the defence and the mode of conducting it and all that is incidental to its conduct ... and to decide which witnesses to call or to call no witnesses at all and the order in which to call them" (see *Halsbury's Laws of Malaysia* vol 1 para 10.8-027 and the authorities cited) abruptly closed the defendants' case, albeit that cross-examination of the 1st defendant was yet not over. However, Mr Retnam asked for another day to deliver his oral submission; Mr Zakaria agreed that time to that request. Under those circumstances, Mr Retnam's request was granted.

Mr Retnam submitted as follows. The plaintiff had not proved fraud on the part of the 1st defendant. The evidence of the relationship between the plaintiff and 1st defendant did not show any special relationship. There was no special relationship. There must be a relationship of active confidence. The plaintiff executed the transfer in the presence of the Land Administrator. Being 23 years old, the plaintiff was a mature person who knew what he was doing. The plaintiff knew the consequences of his act. The plaintiff had his own mind. Whereas he could inform the Land Administrator that he was not willing to execute the transfer, the plaintiff remained silent. The defendants showed good faith by providing food and advice to the plaintiff. The plaintiff had not proved his case.

Mr Zakaria submitted that the stated consideration in the memorandum of transfer was not a consideration within the meaning of the National Land Code. The burden was on the defendants to prove that the transfer was regular. It could be seen from the evidence that the 1st defendant was the putative father. The refusal of the 2nd defendant to answer in court raised an adverse inference against the 2nd defendant. The plaintiff had no independent advice. It could not be believed that a 23 year old could prepare the memorandum of transfer, and then proceed to the Land Office to give away his land. Logically, the plaintiff could not have known how to transfer his land. The transfer should be set aside under s. 20 of the Contracts Act 1950 (CA 1950).

With regard to the equitable doctrine of 'undue influence' relied by the plaintiff, s. 16 of the CA 1950 reads as follows:

> 16(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> 16(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

16(3)(a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

16(3)(b) Nothing in this subsection shall affect section 111 of the Evidence Act, 1950.

Section 111 of the Evidence Act 1950 (EA 1950) which is to be read with s. 16 of the CA 1950 (see *Saad bin Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98) provides:

where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Therefore together, s. 16(2) of the CA 1950 and s. 111 of the EA 1950 say that where there is a question as to the good faith of a transaction between parties, one of whom is within the meaning of s. 16(2)(a) or (b), the burden of proving the good faith of the transaction is on the party within the meaning of s. 16(2)(a) or (b) of the CA 1950.

Indeed, where a complainant shows, "in the first instance, that there was a relationship of trust and confidence between complainant and wrongdoer of such nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction", the complainant need not "produce evidence that actual undue influence was exerted in relation to the particular transaction ... once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely ..." (*Bank of Credit and Commerce International SA v. Aboody* [1990] QB 923 and cited with approval in *Barclays Bank plc v. O'Brien* [1994] 1 AC 180; see also *Southern Bank Bhd v. Abdul Raof Rakinan & Anor* [2001] 1 CLJ 94). "Where on account of such relationship one of them is in a position to exert undue influence or 'dominion' over the other and takes any benefit from him, the burden of proving good faith of the transaction is thrown upon

the dominant party, ie the party who is in a position of active confidence ... When the party complaining show such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position and that no information which should have been communicated has been withheld" (*Sarkar on Evidence* 14th edn p 1463).

"The principle on which the court acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed (*Huguenin v. Baseley* 14 Ves 273, 286; Kerr p 182). If it is established that the defendant was in a position to dominate his will and that the transaction was unconscionable the burden of proof of absence of undue influence rests upon the defendant (*Ballo v. Parasam,* A [1972] HP 33)" (*Sarkar supra* at 1464).

As for the ramification, "when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just" (CA 1950 s. 20).

That this jurisdiction to relieve undue influence is wide, could be further seen from the following authorities.

In *National Westminster Bank plc v. Morgan* [1985] 1 All ER 821 at 831, Lord Scarmand said:

> There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one's folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends on the particular facts of the case.

In *Tate v. Williamson* [1866] 2 Ch App 55, 60 & 61, Lord Chelmsford said:

> The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description ... the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Whenever two persons stand in such a relationship that, while it continues, confidence is necessarily reposed by one and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage although the transaction would not have been impeached if no such confidential relationship had existed.

And in *Tengku Abdullah Ibni Sultan Abu Bakar v. Mohd Latiff bin Shah Mohd* [1997] 2 CLJ 607, Gopal Sri Rain JCA said:

> Undue influence, like all equitable doctrine, is an extremely flexible concept. Subject to policy considerations, the categories in which it may operate are therefore not closed. For this reason, it is important to apply the doctrine, as housed in s. 16 of the Contracts Act 1950, to varying fact patterns in a flexible manner. This is to be done by interpreting s. 16 in a broad and liberal fashion. Being a remedial provision – in the sense that it is designed to relieve obligations – it should, in our judgment, be given a liberal interpretation. Even in cases which are not *stricto sensu* contractual in nature, the section may be resorted to by analogy. Another reason for adopting this approach to interpretation lies in the absence of any intention on the part of Parliament to alter the doctrine or to deprive it of flexibility it has acquired through historical development ... the proof of dominance of the will of a party to a transaction, be it a gift ... by the other party to the transaction is not a *sine qua non* of the doctrine of undue influence. The doctrine applies with equal force where, from the proved or admitted facts, there is shown a relationship of confidence and an abuse of that confidence by the person in whom it was reposed.

Interpretation of the words 'active confidence' and 'undue influence' is to be wide as well. "The words 'active confidence' should, in order that the law may be really protective, receive a wider interpretation (*Benoy v. Santi* 40 CWN 45:62 CLJ 99). (Active confidence) may be presumed to exist as a natural consequence of the condition of the parties, though it be not actually proved that the one habitually acted as if under the dominion of the other. There are many relations of common occurrence in life from which the court presumes confidence put in the general course of affairs and influence exerted in the particular transaction complained of (*Smith v. Kay* 7 HLC 750). Persons may therefore not only be proved by direct evidence of conduct, but presumed by reason of standing in any of these suspected relations, as they be called, to a position of commanding influence over those from whom they take a

benefit. In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence and was not given with due freedom and deliberation. They must take upon themselves the whole proof that the thing is righteous. A stringent rule of evidence is imposed as safeguards against evasion of the substantive law (*Pollock on Contract* p. 581)" (*Sarkar supra* pp. 1467-1468). "As no court has ever attempted to define fraud, so no court has ever attempted to define undue influence, which includes one of its many varieties" (*Allcard v. Skinner* 36 Ch D 145 per Lindley LJ).

Lindley LJ thus demarcated the doctrine of undue influence:

> The principle must be examined. What then is the principle? Is it, that is right and expedient to save a person from the consequences of his own folly, or is it right and expedient to save him from being victimised by other person? In my opinion the doctrine of undue influence is founded on the second of those two principles. Courts of equity have never set aside gifts on the ground of folly, imprudence, or want of foresight on the part of the donors. The courts have always repudiated any such jurisdiction. *Huguenin v. Baseley* is itself a clear authority to this effect. It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back their property which they foolishly made away with ... On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of the law.

In the same case, Cotton LJ classified the gifts that could be set aside:

> These decisions may be divided into two classes: first, where the court has been satisfied that the gift was a result of influence expressly used by the donee for the purpose; secondly, where the relations between the donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor ... The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases, the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom from being abused.

And *Pollock's Indian Contract Act*, 7th edn p. 92 thus summed up the position:

> It is impossible to find plain and clear-cut categories for transactions which are often obscure and complicated, and sometimes purposely made so. Practically the most important thing to bear in mind is that persons in authority, or holding confidential employments such as that of a spiritual, medical, or legal adviser, are called on to act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional work done) from those who are under their authority or guidance. In fact, their honourable prudent course is to insist on the other party taking independent advice.

Still on the subject of a gift, which is about the closest analogy to the instant transaction in which no benefit moved to the plaintiff, there is the importance of bringing home to the mind of the donor the consequences of his gift, to rebut a presumption of undue influence arising upon proof of the existence of a relationship between the parties. Lord Hailsham LC, in *Inche Noriah v. Shaik Allie bin Omar* [1929] AC 127, said:

> In the present case their Lordships do not doubt that Mr Aitken acted in good faith; but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being taken away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and effectively, have benefited the donee without risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships's view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties ...

A similar observation was made in *Lim Kim Hua v. Ho Chui Lan & Anor* [1996] 2 CLJ 299, where the court held that there was a special relationship between a grandmother (the plaintiff/transferor) and her granddaughter (the defendant/transferee) as the plaintiff, old, illiterate and with poor memory, was living with the defendant who provided her food and accommodation, as the plaintiff entrusted the management of her shophouse (the subject of the transfer) to the defendant and as the plaintiff was dependent on the defendant in both her physical and financial needs, and that undue influence could reasonably be inferred from those factors unless the defendant could show that she had not abused her position, and that the transfer was not brought about by undue influence. Steve Shim J (as he then was) said:

> She must show, by strict proof, that the plaintiff understood, not just the nature of the transfer but its full significance and effect: see *Zamet & Ors v. Hyman & Anor* [1961] 3 All ER 933; [1961] 1 WLR 1442. I do not think that the defendant has done so. She has merely allege that the plaintiff wanted to effect the said transfer in a hurry and that the contents therein were read and explained to her. In my view, this could not be sufficient to rebut undue influence. As Lord Eldon said in *Huguenin v. Baseley*:
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> > The question is not whether she knew what she was doing, had done or proposed to do, but how the intention was produced; whether all that care and providence was placed round her, as against who advised her, which, from their situation and relation with respect to her they were bound to exert on her behalf.

> In the instant case, the defendant has not adduced evidence to show that all care and providence had been taken by her that the plaintiff was put in possession of all material facts and information so as to enable her to decide fairly, fully and freely what she wanted to do with her property. The plaintiff placed in the position she was in relation to the defendant, must be in full view and complete appreciation of what she was doing. In my view, the defendant should, in the circumstances of this case, not only have drawn the plaintiff's attention to the provisions of the 1983 will but also to the consequential effect or effects upon the execution of the memorandum of transfer. By keeping silent, she had actively concealed the material facts and thus committed dishonesty against the plaintiff.

It all comes to this. In order to succeed, the plaintiff must show actual undue influence, that is if he cannot show in the first instance that there was a relationship of such nature that it is fair to presume that the defendants abused that relationship in procuring the plaintiff to transfer the said land.

Now for whatever reason, the plaintiff devoted the greater part of his testimony to the actual undue influence that was (allegedly) exerted by the 1st defendant. The plaintiff said very little on his relationship with the defendants – he only testified that the defendants are his uncles, that for about three - four years after his mother passed away the 1st defendant provided him food, and, that the 1st defendant borne the expenses of his marriage. The plaintiff only gave an inkling of the influence of the 1st defendant – the plaintiff testified that if anyone else other than the 1st defendant, had asked him, he would not have executed the transfer.

Surprisingly, it was the 1st defendant who rendered an eloquent account of the relationship between the plaintiff and 1st defendant. There was no dispute that the plaintiff was 11 years old when his father died in 1975. Against that backdrop, the 1st defendant gave the following account of his relationship with the plaintiff. After the death of the plaintiff's father, he shouldered the expenses of the plaintiff and his mother until the plaintiff was an adult. All in all, he supported the plaintiff for 18 years. After the death of the plaintiff's father, he provided food, clothing and expenses to the plaintiff. After the death of the plaintiff's mother and until 1990, he continued his role as guardian of the plaintiff. He played the role as the plaintiff's father. The plaintiff always obeyed his instructions. He would reprimand the plaintiff, if he (plaintiff) misbehaved. The 1st defendant further testified, that the plaintiff, since the death of his parents, always listened to his advice and instructions.

There should be no doubt therefore that it is the 1st defendant's case, that in relation to the plaintiff – a young man who lost his father when he was 11 and his mother when he was 22 – he was in *loco parentis* or had put himself in *loco parentis*. Then presumably, the 1st defendant would have had

considerable clout and authority over the plaintiff – the 1st defendant himself said that the plaintiff always obeyed him. Indeed, it would appear that the 1st defendant would have had more than just mere moral authority, for at the material time of the transfer in 1987 the plaintiff was unemployed and without parents and was totally dependent on the 1st defendant for his daily subsistence. Given the condition of the parties from the facts of the case, it would appear only that the 1st defendant could dominate the will of the plaintiff, if he wanted to. Indeed from the facts of the case, it is fair to presume that there was a relationship in which the 1st defendant was in position to exert undue influence or 'dominion' over the plaintiff, a relationship in which confidence was necessarily reposed by the plaintiff and influence which naturally grew out of that confidence was possessed by the 1st defendant a relationship in which the law presumes everything against the benefit taken by the defendants from the plaintiff. That being the case, the onus was on the defendants to prove the absence of undue influence, to show that the transfer was perfectly fair and reasonable, and that they had not taken advantage of the 1st defendant's position, and to rebut the presumption that the transfer was procured by the exertion of undue influence and was not given with due freedom and deliberation.

That the impugned transfer was wholly disadvantageous to the plaintiff could not be denied. Still, the defendants would be permitted to retain the advantage obtained from the plaintiff, if they could prove good faith. The all important question is whether the defendants had proved good faith and or rebutted the presumption of undue influence. The plaintiff testified that the 1st defendant told him, when he asked the 1st defendant why the Land Office asked him (plaintiff) if he (plaintiff) was agreeable to give the said land to the defendants, that he (plaintiff) could not, "take" the said land as the said land was the property of the estate of Tok Wan Abu Bakar. Pertinently, the consideration stated in the memorandum of transfer (AB1 - AB4) for the transfer – "memberi balik 1/3 bahagian ini kepada penerima-penerima sah ..." – is not at all inconsistent with the plaintiff's version that he transferred the said land as the 1st defendant had said to him that he could not inherit the property of Tok Wan Abu Bakar. Indeed, it would well be difficult to argue, if it could be argued at all, that the plaintiff's version is not reflected in the consideration stated in the memorandum of transfer.

On the other hand, there is only the word of the 1st defendant that he did not ask the plaintiff to transfer the said land and did not know why the plaintiff transferred his undivided share of the land to the defendants. According to the 1st defendant, the plaintiff got to know of the transfer (to the plaintiff) from his sister (the plaintiff's mother), and "bila plaintif dapat tahu pindah milik kepada dia, plaintif sendiri dengan rela, serah tanah kepada

tanah kepada defendan kedua dan saya". But that testimony would not fit in with the following established facts – (i) the 1st defendant's sister died on 23 January 1986, whilst (ii) the transfer was executed, more than a year later, on 24 March 1987. If it was true that the plaintiff got to know of the transfer to him from his mother, and that could have been whilst his mother was still alive, then the plaintiff knew of the transfer to him before 23 January 1986, ie, before his mother passed away. And if it was true that "bila plaintif dapat tahu pindah milik kepada dia, plaintif sendiri dengan rela, serah tanah kepada tanah kepada defendan kedua and saya", then the transfer would have been executed reasonably before 23 January 1986 or just thereabouts. But the fact of the matter is that the impugned transfer took place a year and more later. Given that fact, the 1st defendant's testimony – "bila plaintif dapat tahu pindah milik kepada dia, plaintif sendiri dengan rela, serah tanah kepada tanah kepada defendan kedua and saya" – could not therefore be true.

Elsewhere, the 1st defendant's testimony that he did not know why the plaintiff transferred the said land to the defendants, could not be seriously questioned. As said, the memorandum of transfer (AB1 - AB4) stated clearly the consideration for the transfer – "memberi balik 1/3 bahagian ini kepada penerima-penerima sah ...". That stated consideration provided clearly the rationale for the transfer. As party to the transfer and where the rationale for the transfer was clearly stated in the memorandum of transfer, the 1st defendant could not reasonably say that he did not know why the plaintiff transferred his interest to the defendants. Moreover, it was not pleaded by the defendants, that they did not know why the plaintiff transferred the said land to them. The defendants only pleaded that the plaintiff on his own volition transferred his interest to them – "Plaintif dengan niat sendiri telah setujui untuk memindah bahagiannya kepada defendan". Likewise, the 1st defendant's testimony when he was examined-in-chief, that the plaintiff felt morally obligated, and that the plaintiff had other lands in Kuala Muda, were not pleaded. The pleaded defence was that the plaintiff gave away his land, of his own free will. Whatever the reason for the transfer, the defendants must show that the plaintiff gave away his land, of his own free will.

Unquestionably, the 1st defendant's testimony that he supported the plaintiff and or that he did this or that for the plaintiff, was not any evidence tending towards proof of free will or good faith. Apart from the 1st defendants's denial of any knowledge of the reason for the transfer, the evidence tending toward proof of free will and good faith was the 1st defendant's testimony that he did not say that the said land was the property of the estate of Tok Wan Abu Bakar, that he did not ask and did not force the plaintiff to transfer the said land, that the plaintiff asked him to be at the Land Office, that the plaintiff gave instructions for the preparation of the memorandum of transfer, and, that the plaintiff did not object to the transfer.

Evidently, the 1st defendant's story was that the transfer was all arranged by the plaintiff alone. The story, in other words, was that other than to accept the transfer, the defendants had no part in it. But someone did arrange with the Land Office for the execution and attestation of the transfer. If it was not the defendants, then it was the plaintiff. If it was the plaintiff who instructed the Land Office, then the Land Office could assume that the plaintiff would transfer his land. The unchallenged testimony of the plaintiff was that the Land Office asked him whether he was agreeable to transfer his land to the defendants, and that he asked the 1st defendant what was going on. According to the 1st defendant, the plaintiff did not object to the transfer – "Rosli tidak membantah tentang pindahmilik". But then, why should the Land Office ask the plaintiff – if it was the plaintiff who arranged with the Land Office for the attestation of the transfer and so as the instructing party would naturally execute the transfer – whether the plaintiff was agreeable to transfer his land to the defendants? And why should the plaintiff ask the 1st defendant – if it was the plaintiff who gave the instructions for the preparation of the transfer and so naturally knew the reason for his presence at the Land Office – what was going on? Or would it not be, given that a party not objecting would not be the party proposing the subject for opinion, that the 1st defendant's testimony "Rosli tidak membantah tentang pindahmilik", is entirely consistent with the plaintiff's version that he was asked whether he was agreeable to transfer the said land to the defendants?

The sad truth is that the 1st defendant's story, sated with contradictions and inconsistencies, left more questions than answers. The 1st defendant admitted that at the material time of the transfer, the said land was no longer the property of the estate of Tok Wan Abu Bakar. Accordingly, at the material time of the transfer, the beneficiaries of the estate of Tok Wan Abu Bakar, if any, could not have had claims against the said land. After all, it was transferred to the plaintiff by his mother whether adoptive or not who probably acquired that property by way of distribution to her. Undoubtedly, the said land of the plaintiff was his to keep. There was no reason for the plaintiff to yield what was rightfully his to any of the beneficiaries of the estate of Tok Wan Abu Bakar. So clearly, the stated consideration for the transfer – "memberi balik 1/3 bahagian ini kepada penerima-penerima sah ..." – misstated the truth. The 1st defendant knew the truth – "saya setuju tanah Rosli atau bahagian Rosli bukan harta pusaka lagi" – but he did not disclose the fact that there were no "penerima-penerima sah" to the plaintiff. If it was the plaintiff who gave the instructions for the preparation of the transfer, then both defendants (the 1st defendant testified that both defendants were at the Land Office – "Semasa pindahmillik di tandatangani defendan kedua juga berada") did not put right the plaintiff's misconception that the defendants were "penerima-penerima sah". By remaining silent, the defendants actively

concealed the fact that there were no "penerima-penerima sah". The defendants allowed the plaintiff's misconception to endure in a transaction that benefited only them, a transaction that might not have been if the plaintiff was appraised of all the facts. There was no good faith. It is plain as a pikestaff that the transaction was not an act of folly, or a gift as the 1st defendant had attempted to make it out to be – "Saya tidak tahu mengapa dia pindahmilik kepada defendan pertama dan kedua". The facts say that the transaction was not fair and reasonable, that there was a relationship of such nature that it is fair to presume that the defendants abused the relationship between the plaintiff and 1st defendant, and that information within the personal knowledge of the defendants (they were not "penerima-penerima sah") which should have been communicated had been withheld. Definitely the defendants had not shown that the transfer was fair and reasonable, nor rebutted the presumption that the transfer was procured by the exertion of undue influence.

But really, to all intents and purposes, the defendants scuttled their own case when they closed their defence in the midst of the cross-examination of the 1st defendant. Section 138 of the Evidence Act 1950 provides:

> Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined; then (if the party calling him so desires) re-examined.

Consequently, witnesses examined in chief, if the adverse party so desires, are subject to cross-examination. "The rule of the common law is that no evidence shall be admitted, but what is or might be under the examination of both parties ... The same rule is stated in *Halsbury* 3rd edn, vol 15 para 800: 'No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination'. It is certainly implied by s. 138 that a party must have had an opportunity to cross-examine and it does not mean that merely a right to cross-examine a witness without an opportunity being offered for cross-examination is sufficient compliance with the requirement of law ... As a general rule evidence is not legally admissible against a party, who at the time it was given had no opportunity to cross-examine the witness or of rebutting their testimony by other evidence ... It is the right of every litigant in a suit, unless he waives it, to have an opportunity of cross-examining witnesses whose testimony is to be used against him ..." (*Sarkar on Evidence* 15th edn p. 2169-2170). In the instant case, the plaintiff was deprived of that fundamental right given him by law – the 1st defendant evaded further cross-examination. Considering that the probative value of the evidence of a witness who could not be cross-examined due to his death before he could be cross-examined may be very small and may even be disregarded (*Sarkar on Evidence* 15th edn p. 2170), then only rightly the 1st defendant's testimony affecting the plaintiff, even if any, should even be disregarded.

It must pan out, for the reasons herein, that the said land must be returned to the plaintiff. Accordingly, (i) the memorandum of transfer – Perserahan 3794/87 Jilid 522 Folio 113 and registered on 14 May 1987 – is declared null and void, (ii) the entry on the register relating to the aforesaid memorandum of transfer is cancelled, and, (iii) the defendants are to deliver up the document of title for cancellation of the aforesaid transfer, and pay the costs of this action to the plaintiff.